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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 124

LONNIE AVERY, PETITIONER,

vs.

THE STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED JUNE 20, 1939.

CERTIORARI GRANTED OCTOBER 16, 1939.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN CIRCUIT COURT OF BIBB COUNTY

INDICTMENT—Filed Oct. 4, 1934

The Grand Jury of said County charge that, before the finding of this indictment, Lonnie Avery, unlawfully and with malice aforethought, killed Caroline Avery, alias Carolina Avery, by shooting her with a pistol.

Against the Peace and dignity of the State of Alabama.

J. H. James, Solicitor of 4th Judicial Circuit.

No. 77. The State of Alabama vs. Lonnie Avery; Charge, Murder, First Degree; No Prosecutor: Witnesses: Lewis Snead, Will Bradley, Malinda Bradley.

A True Bill. W. R. Young, Foreman of the Grand Jury.

Filed in open court on the 4th day of October, 1934, in the presence of the Grand Jury. Marie Waller, Clerk.

[fol. 2] IN CIRCUIT COURT OF BIBB COUNTY

ARRAIGNMENT—March 21, 1938.

The defendant, being personally present in open court and having no attorney, it is ordered by the Court that Fred Wood and John Foshee, practicing attorneys of the Bibb County Bar, be and they are hereby appointed to represent the defendant in this case.

The defendant and his attorneys, Fred Wood and John Foshee being in open Court, and the defendant being duly and legally arraigned, pleads "Not Guilty", and not Guilty by reason of insanity, whereupon it is ordered by the Court:

1. That Wednesday, March 23, 1938, be and hereby is set for the trial of this case.

2. That the sheriff summon 62 jurors for the trial of this case, including the regular jurors drawn for the week of the trial.

3. That the names of 2 jurors be drawn from the jury box, who, together with the 60 regular jurors drawn for

the week in which this case is set for trial, shall be those allowed for the trial of this case. And thereupon the presiding Judge of said Court in open court in the presence of the defendant and his attorneys, in accordance with the law, in such cases made and provided, drew from the jury box of Bibb County, Alabama, the names of 2 jurors to complete the venire fixed and allowed for the trial of this case.

4. That a list of all said jurors, regular and special, together with a copy of the indictment, be forthwith served on the defendant by the Sheriff.

5. That the same jurors allowed for the trial of this case be allowed and designated for the trial of each other capital case set for the same day.

[fol. 3] IN CIRCUIT COURT OF BIBB COUNTY

SPECIAL VENIRE DRAWN AND ALLOWED FOR THE TRIAL OF THE CASE OF THE STATE OF ALABAMA VERSUS LONNIE AVERY, AND THE SHERIFF'S RETURN SHOWING SERVICE OF A COPY OF THE INDICTMENT ON THE DEFENDANT

[Title omitted]

No.	Name	Beat	Occupation	Residence
1	R. E. Hardman	1	Ore Worker	Woodstock
2	P. M. Stephens	1	Farmer	Woodstock
3	T. S. Lewis	2	Farmer	West Blocton R2
4	Hester Lewis	2	Farmer	West Blocton
5	Leonard Hubbard	2	Farmer	West Blocton
6	Renfro McBride	3	Farmer	Brent RT
7	David Johnson	3	Teacher	Brent
8	Earnest C. Belcher	3	Farmer	Brent
9	Hardin Hunt	4	Farmer	Centreville Rt
10	J. Cross Steele	4	Merchant	Brent
11	Hullett Stewart	4	Farmer	Centreville
12	Willard T. Bamburg	4	Farmer	Brent Rt
13	Clifton G. Nichols	4	Farmer	Brent
14	V. A. Hunt	4	Druggist	Brent
15	R. Eddie Thompson	4	Farmer	Centreville
16	G. C. Elam	4	Farmer	Brent
17	Jesse D. Parker	4	Carpenter	Centreville Rt
18	Henry P. James	4	Farmer	Brent Rt
19	Herbert H. Murphy	4	Farmer	Brent Rt

No.	Name	Beat	Occupation	Residence
20	J. F. Meigs	5	Farmer	Centreville
21	Joe Suttle	5	Truck Driver	Centreville
22	J. P. Nix	5	Barber	Centreville
23	Frank Lightsey	5	Farmer	Centreville
24	C. A. Lee	5	Farmer	Centreville
25	Judson D. Perkins	5	Farmer	Centreville Rt
26	James Harris	6	Miner	Marvel
27	E. H. Langston	6	Farmer	Centreville
28	Thomas H. Fancher	6	Miner	Piper
29	Wilburn W. Busby	6	Blacksmith	Marvel
30	Claude Pilgreen	6	Miner	Coleanor
31	Alexander Hayes	6	Miner	Marvel
32	Christo J. Hayes	6	Miner	Piper
33	Edwin Davis	6	Clerk	Piper
34	Jefferson Liddle	6	Miner	Marvel
35	A. C. Caldwell	6	Farmer	Piper
36	Raymond Hayes	6	Farmer	Centreville Rt
37	J. E. Smitherman	6	Miner	Marvel
38	J. W. Edwards	7	Farmer	Lawley
39	John Will Hicks	7	Farmer	Lawley
40	I. H. Hicks	7	Farmer	Lawley
41	Sam Cummings	7	Farmer	Randolph
42	J. P. Edwards	7	Farmer	Lawley Rt
43	John Cummings	7	Farmer	Randolph
44	H. R. Belvin	7	Farmer	Randolph
45	O. B. Edwards	7	Farmer	Lawley
46	B. H. Smitherman	7	Farmer	Centreville RT
47	John M. Battles	8	Merchant	Ashby RT
48	Paul Pratt	9	Farmer	West Blocton Rt
49	C. W. Mize	10	Carpenter	West Blocton
50	G. C. Frederick	10	Minister	West Blocton
51	M. T. Smith	10	Merchant	West Blocton
52	Sam V. Morse	10		West Blocton
53	Wilcox Randle	10	Oil Dealer	West Blocton
[fol. 4]				
54	R. B. Seales	10	Miner	West Blocton
55	J. H. Daniels	11	Miner	West Blocton
56	Virgis Ashworth	11		West Blocton
56	J. D. Muse	11	Contractor	West Blocton
58	Victor W Steele	13	Farmer	West Blocton
59	A. A. Hyde	14	Miner	West Blocton
60	Joe Lucas	14	Miner	Belle Ellen
61	Heber Caddell	3	Farmer	Brent
62	C. A. McIntosh	5	Merchant	Centreville Rt

Endorsed: I, R. J. Gardner, Sheriff of Bibb County, Alabama, hereby certify that I served a copy of the within List of Jurors and a copy of the Indictment against Lonnie Avery on the said Lonnie Avery on the 21st day of March, 1938, at 2:00 P. M.

R. J. Gardner, Sheriff.

[fol. 5] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

MOTION FOR CONTINUANCE—Filed March 24, 1938

Now comes the defendant, Lonnie Avery, by his attorneys, John Foshee and J. Fred Wood, and moves the Court to continue said cause and as grounds for said motion sets down and assigns the following separately and severally, to-wit:

1. The attorneys for the defendant were appointed by the Court to represent the defendant in said cause on, to-wit, March 21, 1938, and said cause was set for hearing and trial on, to-wit, March 23, 1938, and said attorneys have not had a reasonable time in which to prepare the case for trial.

2. The attorneys for the defendant were appointed by the Court and since their said appointment they have not had sufficient time to investigate the case, to search for available evidence in favor of the defendant, to study the law relative to the case and to adequately prepare the case for trial.

3. The attorneys for the defendant were appointed by the Court to represent the defendant on, to-wit, March 21, 1938, and on that date and each day since said attorneys have each had other cases in which they were attorneys for other defendants set for trial in said Court and have therefore been unable to leave the Court for the purpose of investigating the facts of this cause or to do anything toward the preparation of the cause for trial.

4. To require the defendant to go to trial or be put to trial upon this date and upon the day said cause is set [fol. 6] for hearing and trial denies to the defendant the right to be represented by attorneys or attorney.

5. This case is to be tried upon an indictment presented a Grand Jury of Bibb County, Alabama, and one entire day has not transpired after the case has been placed upon the trial docket of this Court.

6. The counsel for the defendant, who were appointed by the Court to represent the defendant on March 21, 1938,

have not had sufficient time in which to prepare and make defense in said cause.

7. The defendant is unable to employ counsel and is charged with a capital offense and counsel appointed by the Court on, to-wit, March 21, 1938, since said date have to be continuously engaged with other cases in said Court and have not had sufficient time to prepare and make defense in said cause.

8. To put the defendant to trial on the 23 day of March, 1938, is a violation of Section 5567 of the 1932 Code of Alabama.

John Foshee, J. Fred Wood, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 7] AFFIDAVIT OF JOHN FOSHEE

STATE OF ALABAMA,
Bibb County:

Before me, the undersigned authority, personally appeared John Foshee, who being by me first duly sworn to speak the truth, the whole truth and nothing bu- the truth, doth depose and say:

On Monday, March 21, 1938, I was appointed by the Circuit Court of Bibb County, Alabama, along with J. Fred Wood, another attorney, to defend Lonnie Avery in said Court on a charge of Murder. My appointment was made at the time the defendant, Lonnie Avery, was arraigned. The appointment and arraignment took place at about two P. M. O'clock, on March 21, 1938, March 23, 1938, was the date set for the trial of said Lonnie Avery. At the time I was appointed to defend Lonnie Avery I was going into the trial of another case. I was engaged in this case until about 9:00 P. M. O'clock, March 21, 1938. I had other cases on the docket of said Court which required my presence in the Court Room on March 22, 1938. I have not had any time to find witnesses, for the defendant, Lonnie Avery, and interview them. I have not had the time at my disposal to study the law in this case and present a defense for Lonnie Avery. I have talked with and observed Lonnie

Avery, the Defendant, on one occasion since my appointment and from this observation and conversation I have serious doubts as to his sanity. I have not had an opportunity to have competent physicians to examine him as to his sanity. I have been informed and believe that Mr. J. Fred Wood, who was appointed to assist me in the defense of this case, has also been engaged in Court and has not had an opportunity to prepare a defense for Lonnie Avery. I am not now prepared to go into the trial of Lonnie Avery's case. I have not had sufficient time to prepare and make defense in this case. I was also detained in Court on March 23rd, 1938, waiting for Lonnie Avery's case to be called.

I am making this affidavit in support of a motion for a continuance of the cause of State of Alabama *v.* Lonnie Avery, now pending in the Circuit Court of Bibb County, Alabama, which Mr. J. Fred Wood and myself have filed in said cause and presented to the Court.

John Foshee.

Subscribed to and sworn to before me in this the 24 day of March, 1938. Marie Waller, Clerk Circuit Court Bibb Co. Ala. Filed in office March 24, 1938. Marie Waller, Clerk.

[fol. 8] AFFIDAVIT OF J. FRED WOOD

STATE OF ALABAMA,
Bibb County:

Before me, the undersigned authority, personally appeared J. Fred Wood, who, being by me first duly sworn to speak the truth, the whole truth and nothing but the truth, doth depose and say:

On Monday, March 21, 1938, John Foshee and I were appointed by the Circuit Court of Bibb County, Alabama, to represent and defend Lonnie Avery in said Court on a charge of murder. Our appointment was made at the time the defendant, Lonnie Avery, was arraigned. The appointment and arraignment took place on the afternoon of March 21, 1938, at about two o'clock. The date set for the trial of the said Lonnie Avery was to-wit, March 23, 1938. At the time we were appointed to defend the said Lonnie Avery, the Spring Session of the Criminal Court of the

Circuit Court of Bibb County, Alabama, was in session. I had been employed by other defendants to represent them in said Court which was at that time in Session. I had cases set for trial on Monday, March 21, 1938, but some of those cases were not disposed of and were carried over to the following day, and my last case was disposed of about 4:30 o'clock on the afternoon of March 22, 1938. Having those cases in Court it was necessary for me to remain in Court until my last case was disposed of that was set for trial on the days of March 21 and 22, 1938. I have not had the opportunity to study the facts or law in order to prepare a defense for the said Lonnie Avery, and I am not prepared at this time to go into the trial of the said Lonnie Avery's case. I have not had sufficient time to perpare and make a defense in this case. I was also detained in Court on March 23, 1938, waiting for Lonnie Avery's case to be called for trial.

I am making this affidavir in support of a motion for a continuance of the case of State of Alabama vs. Lonnie Avery, which is set for trial on March 28, 1938, in the Circuit Court of Bibb County, Alabama, which said motion has been filed by John Foshee and myself in said cause and presented to the Court.

J. Fred Wood.

Subscribed to and sworn to before me on this the 24 day of March, 1938. Marie Waller, Clerk of Circuit Court Bibb County, Alabama.

Filed in Office, March 24, 1938. Marie Waller, Clerk.

[fol. 9] IN CIRCUIT COURT OF BIBB COUNTY

VERDICT AND JUDGMENT—March 24, 1938

Came the State of Alabama by its Solicitor and the defendant, Lonnie Avery, in his own proper person and by and with his attorneys, and, being arraigned in open court upon the indictment in this case, the defendant pleaded "Not Guilty" and interposed the special plea of not guilty by reason of insanity. By leave of the Court, the defendant withdraws his special plea of not guilty by reason of insanity, and issue being joined:

Thereupon came a jury of twelve good and lawful men, to-wit:

1. Christo J. Hayes	7. Joe Suttle
2. Wilburn W. Busby	8. J. P. Nix
3. I. H. Hicks	9. B. H. Smitherman
4. Judson D. Perkins	10. O. B. Edwards
5. Edwin Davis	11. Frank Lightsey
6. J. E. Smitherman	12. Claude Pilgreen

who having been elected and duly sworn according to law, on their oaths say: "We, the jury find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at death."

It is therefore considered and adjudged by the Court that the defendant is guilty of murder in the First Degree, as charged in the indictment.

[fol. 10] IN CIRCUIT COURT OF BIBB COUNTY.

SENTENCE—March 24, 1938

And now on this day, to-wit, March 24, 1938, the defendant, Lonnie Avery, being again present in open Court in his own proper person and with his said attorneys, and being asked by the Court if he has anything to say why the sentence of the law should not now be pronounced upon him, says nothing.

It is therefore adjudged and considered by the Court, and it is the order, sentence and judgment of the Court, that the defendant at the Bar, the said Lonnie Avery, as a punishment for the offense of which he has been convicted by the jury, and of which he has been adjudged guilty by the Court, be put to death on Friday, May 13th, 1938, and before sunrise on said day, by electrocution, at the place, in the manner and made required by law, and that this sentence of death be executed by the proper person designated by law to execute the sentence of death upon convicts, by causing to pass through the body of the defendant a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of said defendant until the defendant is dead.

And before passing sentence, the Court proceeded to ascertain by examination of the defendant under oath, and other evidence, that the defendant is of the male sex, negro race, is by way of occupation a laborer, that he is about 32 years of age and that his health is good.

The name and post office address of his nearest relative is John Thomas Avery, Brent, Alabama, Post office Box 15.

The defendant, Lonnie Avery, having reserved questions of law for the consideration of the Supreme Court, and having taken an appeal to the Supreme Court from said judgment and sentence, and the defendant desiring the execution of said sentence suspended pending said appeal, it is therefore ordered by the Court that the said appeal to the Supreme Court be granted and allowed to the defendant, and it is further ordered by the Court that the execution of said sentence be, and the same is hereby suspended to await the action of the Supreme Court on the appeal in this case.

[fol. 11] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed March 24, 1938

Now comes the defendant in the above styled cause and moves the Court to arrest and set aside the verdict heretofore rendered in said cause and grant the defendant a new trial in said cause and as grounds for said motion sets down and assigns the following, separately and severally, to-wit:

1. The verdict was contrary to the evidence in this case.

2. The verdict is contrary to the evidence in this cause.

3. The verdict is contrary to the law applicable to this case.

4. The verdict is contrary to the law and evidence in this case.

5. The Court erred in refusing the motion of the defendant for a continuance.

6. The Court erred in refusing to grant the motion of the defendant for a continuance of the cause.

7. The Court should have granted the motion of the defendant for a continuance of said cause.

8. The Court abused its discretion in refusing to grant the motion of the defendant for a continuance of said cause.

L. S. Moore, J. Fred Wood, John Foshee, Attorneys for Defendant.

[File endorsement omitted.]

I accept service of copy of this Motion March 23, 1938.
J. H. James, Solicitor.

This motion presented to me this March 23, 1938 and is set down for hearing at Centerville, Ala., on April 16, 1938,
Jno. Miller, Judge.

[fol. 12] On this the 16th day of April, 1938, this Motion is continued to May 9th, 1938.
Jno. Miller, Judge.

On this May 9, 1938, this motion is continued to June 6, 1938.
Jno. Miller, Judge.

On this June 6th, 1938, this Motion is continued to June 30, 1938.
Jno. Miller, Judge.

ORDER OVERRULING MOTION

On this June 30, 1938, this Motion with Amendment submitted and argued and upon consideration of it and the evidence, it is denied and overruled, and Defendant excepts to the ruling of the Court.
Jno. Miller, Judge.

[fol. 13] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

AMENDMENT TO MOTION FOR NEW TRIAL—Filed June 30, 1938

Now comes the defendant in the above styled cause, and with leave of the Court first had and obtained, amends his

motion for a new trial heretofore filed in said cause by adding thereto the following grounds for said motion, to-wit:

9. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to The Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial.

10. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: The defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

11. The defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America specifically as follows: (1) The defendant was not given a fair, impartial and deliberate trial; and (2) the defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

12. The defendant was denied due process of law in contravention of The Fourteenth Amendment to the Constitution of the United States of America.

13. The defendant was denied equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

L. S. Moore, John Foshee, J. Fred Wood, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF BIBB COUNTY

[Title omitted]

Bill of Exceptions—Filed September 21, 1938

Be it Remembered, that on to-wit: the 24th day of March, A. D. 1938, upon the trial of the above entitled cause in the

said court, at the place of holding same, before the Hon. John Miller, Judge of the Circuit Court, then and there presiding, with the jury duly empanelled, the following proceedings were had, to-wit:

WILL BRADLEY, a material witness for the State, being first duly sworn, testified as follers:

My name is Will Bradley. I live in West Virginia. I livid in Bibb County, Alabama, in 1934, near the Bibb and Perry County line. I knew Caroline Avery in her lifetime. She is now dead and I saw her killed. Lonnie Avery, the Defendant at the bar killed her in February 1932. I saw the killing. It happened in Bibb County, Alabama. Caroline Avery was not my sister, she was my adopted child and I had raised her. She was killed in the day time. She was living at my home at that time. She was the wife of Lonnie Avery. He had been living with her immediately before that, up to a couple of months before that time. She was, at that time, living at my home, but he was not. On the day she was killed, she left my house to go to Louis Snead's to get a tub to wash in. Louis Snead's house is about two hundred and fifty yards from my house. After she left my house, and before she got to Louis Snead's house, I heard her voice telling Lonnie that she would go back if he didn't kill her. I looked that way and her hands were up this way. He was facing her and she was facing him. He had a pistol in his right hand. I did not hear him say anything to her when she said that, but she broke to run. When she broke to run, he fired at her twice. She turned round and made two or three steps toward him and fell on her face. He approached her then and stood above her and shot twice across her. She was still lying on her face. Then he walked back of her and fired a shot back here, in the back of her head. I hollered at him then and asked what he was doing and he broke and run. I could see him. I didn't see him again until the past Monday. He hasn't been down in this section since [fol. 15] then. After he ran off, I went up to where my daughter was. She had some wounds on her body. One was in her head, one through her left ear and then one in her left shoulder, just below the shoulder blade. I looked right down on the ground where she was lying. There were two bullet scars, on the ground, about that far apart. The two holes were about that size. They were about a foot from

her head. She had a wound in the back of her head and one below the shoulder blade in the back. She was dead.

Cross-examination:

At the time we looked up and saw Lonnie, he had a pistol. Caroline Avery had her hands in the air. I looked up and he shot her twice. Once in the ear and once in the back. Then he shot her twice more on the ground and she was lying on her face, and then he shot her in the back of the head. I was about seventy-five yards from her when he fired this last shot. From where I was standing I couldn't tell that that last bullet hit her in the head, but that is the way he shot, towards her head. I believe it went in her head. I know of my own knowledge that the bullet went in her head. I was seventy-five yards from her. I was about two hundred yards from Lonnie Avery and Caroline Avery when I saw them first. I heard Caroline Avery tell Lonnie Avery that she would come back if he wouldn't kill her. I was two hundred yards away and that is all I heard. Caroline Avery was not standing between me and Lonnie Avery at that time. Lonnie was between me and her. Lonnie's back was to me. I saw the gun in his hand. He was standing like this, and Caroline was over here. I could see the gun two hundred yards away. He had the gun, like this, at his side, where I could see it. This killing took place on February 13th, 1932, between Louis Snead's house and my house. The first time I saw Lonnie Avery that day was when he was standing there with the gun pointed at Caroline Avery. I have never heard Lonnie Avery make any threats toward Caroline Avery. At the time this shooting took place, Lonnie Avery and Caroline Avery were separated and were not living together as man and wife.

MALINDA BRADLEY, a material witness for the State, being first duly sworn, testified as follows:

My name is Malinda Bradley. I am Will Bradleys wife. I knew Caroline Avery in her lifetime, she was my adopted daughter. She is now dead. I saw the shots fired that killed her. At the time she got shot, I was in the edge of my yard. It was in the day time. She hadn't been long left

my house when the killing took place. She left there for [fol. 16] Louis Snead's house to get a tub and a bucket of water. If she had a weapon of any kind, I didn't see it. My husband called me and I went out in the yard. That was the first thing that attracted my attention before the shooting took place. The first thing I saw was Caroline and Lonnie Avery. Lonnie had his back to me and she was facing me. She had her hands up this way. They were facing each other. She said: 'Lonnie, I declare, I will go back if you won't kill me.' She turned then and commenced to running and he fired twice. She then ran a little piece and fell on her face. He walked around opposite to her and shot twice across her and then walked to her face and shot her once. When he shot the fifth time he pointed the pistol at the back of her head. He reached out this way when he shot the last time. Then he ran. Monday, here in the Court room, is the first time I saw that man after he ran.

Cross-examination:

I was in the house at the time my husband called my attention to this. I was in the yard at the time this shooting took place. I was in the edge of the yard, but I couldn't estimate the distance from me to Lonnie and Caroline. It wasn't very far. I did not go up towards where the shooting was taking place. I had gone only to the edge of the yard, when the shooting was over and Lonnie had gone. I could tell from where I was that Lonnie had a pistol in his hands and shot at her head. I could tell that Lonnie had a pistol in his hands when she had her hands up in the air, for I could see the pistol in his hands. He had his back towards me. I can't estimate the distance, even approximately. I can't point out anything around her that was about the distance, but it was not very far. I didn't see Lonnie and Caroline up there scuffling. The first thing I heard was my husband calling me. We were on Mr. D. Barker's land at that time. Mr. D. Barker lived in Marion. Louis Snead lived on the same place at that time. Lonnie Avery did not live around there at that time. Me and my husband and Louis Snead were all close neighbors there.

LOUIS SNEAD, a material witness for the State being first duly sworn, did testify as follows:

My name is Louis Snead. I live down here at Harrisburgs. I knew Caroline Avery. She is now dead. I saw her killed. I was living on Mr. Barker's place then. I saw this woman killed. The first thing I saw was Lonnie Avery and Caroline Avery standing in the road, and they stood there a couple of minutes and she started to run and said: "I'm going back" and Lonnie said: "No, hell, you ain't," and [fol. 17] then he shot twice and she fell and then he made two more shots and then he walked up to her feet and shot again, and then left running. He fired five shots all together. Today is the first time I have seen Lonnie Avery since that time. I haven't seen him around here since then, until today.

Cross-examination:

There were five shots fired. He shot two times and then two more times over her body and then walked around to her feet and shot again. He fired the fifth time at her head. I stood still and counted the shots while this was going on. I was about a hundred and fifty yards from this place, while the shooting was going on. I could see both of them. They were standing angling to me. One was this way and the other was this way, and I was standing where I could see both of them. I could see his side. Will Bradley was standing a little off from me and was not between me and Caroline and Lonnie. I was in a position at that time that the first shot was fired, to see the gun in Lonnie's hands. Nobody called my attention to this difficulty going on up there. No one told me to look that someone was going to get killed. I could see them standing up there. I saw this woman fall. This man run off. This woman started to run off and he shot her twice, and when she fell he shot twice over her body, and then walked around to her feet and shot her once in the head. That is the way I told it at first. When I first saw Caroline and Lonnie, they were standing there talking. They were talking a couple of minutes and Caroline said: "Yes, I am going back," and Lonnie said: "No, hell, you aren't". Then Caroline started to run and he shot her five times. He shot twice while she was running, and then she turned around. She fell on her face and he shot twice more, over her, and then after he shot those two, he walked around to her feet and shot. That is the same thing I repeated a few minutes ago. I am not related to Will Bradley and I am not related to Malinda Bradley.

Redirect examination:

I was standing a few steps away from Will Bradley's yard when I saw the shooting. I was not right with them. I was within a few steps of his yard. I am the Louis Snead who livid up there near them at that time. It was up towards my house that the shooting occurred. That was where the well was and where the tub was.

NEWT SUTTLES, a material witness for the State, being first [fol. 18] duly sworn, did testify as follows:

My name is Newt Suttles. I am a Deputy Sheriff of Bibb County. I know the defendant, Lonnie Avery. Here a short while ago I went somewhere for him.

Q. Where did you go to find him?

The defendant objected to this question on the grounds that it is immaterial to this case, is irrelevant and impertinent. Thereupon the Court overruled the objection of the defendant, to which ruling of the Court, the defendant duly and legally excepted.

A. To Pittsburgh, Pennsylvania.

I went to Pittsburgh, Pennsylvania, and brought him back. I heard him make the statement that his name was William Avery, when I got him.

At this point, the defendant objected to the testimony of the witness and moved to exclude the statement in regard to his name on the grounds that the witness had not been properly qualified, and on the further grounds that it was not pertinent to the facts in this case. Thereupon the Court overruled the objection of the defendant and the defendant duly and legally excepted to the rulings of the Court.

He denied coming from Bibb County, Alabama, saying that he did not know anyone here. He denied his name was Lonnie Avery. I was not a Deputy Sheriff at the time this killing took place. I did not go down there at the time this killing took place. I was gone from here at that time.

At this point the defendant moved to exclude all the testimony of the witness tending to show a confession, on

the ground that it has not been shown by this witness whether or not any threats were made, or hopes or inducements of reward held out to the defendant. The Court overruled the objection of the defendant, to which ruling of the Court, the defendant duly and legally excepted.

WILL BRADLEY, a material witness for the State, is recalled for further redirect examination:

I saw my daughter when she left the house. She did not have any weapons in her hands. I was the first person to get to her and I helped to pick her up. There were not any weapons in her hands.

Here the State rested its case.

LONNIE AVERY, a material witness in his own behalf, being first duly sworn, did testify as follows:

My name is Lonnie Avery, and I am the defendant in this [fol 19] case. I went down there that morning about ten o'clock. I met her and that Snead boy coming from over there. She had a rub board or something and a bucket of water. We began talking and she asked me about a letter a girl wrote and that she had. She got it out of her pocket. She had an automatic pistol under her sweater. I tried to take it away from her and the gun fired. I didn't have anything against her at all. The gun fired and she fell and I run. I had found one letter that some man had written her. We had been separated twice up until that time. We were not living together at the time I met her that day. When she started to pulling out that gun, she said me and you and this woman can't agree. She began drawing the gun out then and I grabbed it and we went to tussling over it, and it went off. This made the second time we had been separated. These letters and things we were fighting over were the cause of our separation. When that gun went off I held on to it and tried to get it away from her. As soon as the gun went off I turned and run. I turned and run as soon as I realized she was shot. I did not have a gun on me when I met her there. After she fell, I did not take the gun and turn around and shoot at her this way, and shoot at her before I run. It was purely an accident the way she got shot. I didn't have that gun in my

hand during the time we were tussling. She had it in her had I had hold of it and we were tussling and it went off. We were quarreling about my woman and her man. She did not say during the time we were scuffling: "If you just don't kill me, I'll come back", and I didn't say "No you won't" or words to that effect. Louis Snead is Malinda Bradley's first cousin, I think. They all lived close around there together. My wife was Will and Malinda Bradley's adopted daughter. She stayed at their house most of the time when she wasn't with me. You could see what was going on from Louis Snead's house, but he wasn't at home. He had gone on past me and Caroline up towards Will Bradley's house. He was not standing at his house when this thing happened. It was not possible to see us standing down there, from Will Bradley's house. There were some bushes that obstructed the view. This was out in the edge of the field. There was a path along there, with bushes all along there. There was some woods just below there. There were bushes between me and Will Bradley's house. From where I was I could see the top half of Will Bradley's house. I could see just about half of it; you couldn't see all of it.

Cross-examination:

Those were oak bushes. It was in February. There weren't any leaves on them. I am thirty-one years old. I did not come out of the bushes there where I saw my wife. I came up the path.

[fol. 20] Q. Where were you staying then?

The defendant objected on the grounds that it is incompetent, irrelevant and immaterial. The Court overruled the objection of the defendant, to which ruling of the Court the defendant duly and legally excepted.

A. I was staying on Mr. James' place about three miles from there.

I walked from home, I didn't go to Bradley's house. She wasn't there. I was going on up the road and I seen her coming from there. I did not go down there to see her. She was with the Snead boy. She had a wash board and he had the water. It was a wash-board she had. I went out there and commenced talking to her. That man went on towards Will's house. I did not pull the pistol out. I did not have the pistol. She had the pistol under

her sweater. I got to tussling with her over the pistol trying to take it from her. I shot her, behind the shoulder, and through the back, tussling with her. I don't know whether I shot her in the ear tussling with her. I don't know that I shot her in the back of the head tussling with her. I did not shoot two shots in the ground tussling with her. I lost that pistol in the swamp. I did not kill that woman when she had her hands up, backing off from me. She didn't have her hand up.

Q. Weren't you convicted in this very Court before, for assault with intent to murder?

The defendant objected to this question on the ground that any former case has nothing to do with this case. The Court, thereupon, overruled the objection of the defendant, to which ruling of the Court, the defendant duly and legally excepted.

A. Yes, sir.

Redirect Examination:

My wife used to carry my razor around; I had seen her with weapons before. She carried my razor around all the time. When I met her, I was on the way to Bradley's house to see her. I was not standing down there waiting for her. Since I met her, I didn't go down to Bradley's house. There were some pine bushes out there. A few pine trees and oak bushed scattered along there. Oak trees keep their leaves pretty late in the winter, B-ack jacks and little oak keep their leaves on them pretty late. There were bushes around there like that where this happened. I do not remember how many times the gun went off while we were scuffling. It went off more than once. It was an automatic, one that keeps shooting every time you pull the trigger.

Recross-examination:

[fol. 21] It will keep shooting every time you pull the trigger. I did not keep pulling the trigger. It wouldn't just shoot by itself, but I didn't pull the trigger, because I didn't have anything against her. Those oaks were the sort of oaks that kept their leaves on them part of the winter. I remember that there were some pines there too.

Here the defendant rested his case.

This was all the evidence introduced in the trial of this case.

During the argument of Hon. Joseph H. James, Solicitor for the State, he made a statement to the jury, which was in substance that the Deputy Sheriff was forced to go to Pennsylvania and get the defendant.

Counsel for defendant objected to this statement on the grounds that there is no testimony to show that the defendant had to be brought back from Pittsburgh, Pennsylvania.

The Court thereupon overruled the objection of the defendant's counsel, whereupon the attorney for Defendant duly and legally excepted to the ruling of the Court.

COURT'S ORAL CHARGE TO THE JURY

Gentlemen of the Jury, the defendant in this case, Lonnie Avery, is charged in this indictment, with the offense of Murder in the first degree. This indictment carries with it also, the offense of murder in the second degree. Two offenses are charged by this indictment. Murder in the first degree and murder in the second degree. Under the law, you gentlemen, I think now, it is your duty to determine from the evidence, what the facts of this case are. Then in doing that, you necessarily pass on the credibility of the witnesses—that is whether or not you will believe the witness or witnesses as they may testify, and then you weigh the testimony after it is given by the witness. Those are the three things which a jury alone can do in a criminal case. The Court has nothing to do with the facts; the Court has nothing to do with the credibility of the witnesses, and the Court has nothing to do with the weighing of the testimony. All the Court does is to pass on whether the testimony is competent, legal and relevant. After a witness testifies, then that testimony is entirely in your hands. You must determine what the facts of this case are from the testimony; then it becomes the duty of the Court to declare to the jury what is the law. The jury, then, must apply the law in the matter to the facts, to see whether or not the defendant is guilty of either one of these offenses or not guilty. [fol. 22] You must pass on the credibility of these witnesses and weigh the testimony you have heard, in the light of your good common sense, which you bring with you into the jury box.

Now, what is murder in the first degree? What is the law with respect to murder in the first degree? Well, the

law says, gentlemen of the jury, that murder in the first degree is the unlawful taking of human life, wilfully, with deliberation, premeditation and with malice. It becomes necessary for you, in this case, to apply the law to the facts to see whether or not this defendant has committed that offense. Now what does the law mean by the unlawful taking of human life. Human life may be taken in this State lawfully. The Sheriff can do it, under certain circumstances; and the warden at Kilby Prison takes human life lawfully every time he pulls the switch for somebody who is in the electric chair; every time the jury says that a defendant should suffer death in the electric chair, and the warden pulls the switch, at Kilby Prison, he has committed no offense, because he is doing what the law commands.

Now, was the death of this woman, Caroline Avery, caused by this defendant without the authority of the law, without any command of the law and without any mandate of the law; then did this defendant, when he shot Caroline Avery, if he did so, did he do that act wilfully; was it his fixed purpose at the time he shot her, if he did shoot her, to shoot her; was he governed at that time by his will? Did he fail to yield to the dictates of his reason? Was it a wilful act on his part? Then the second and third elements of murder in the first degree are that the act must have been deliberate and premeditated. Now, by those two terms deliberate and premeditated, the law means that this defendant, before he fired the shot or shots which took the life of Caroline Avery, that he intended to fire them before he did fire them, and that he intended that her death should follow therefrom.

Now, in order for deliberation and premeditation to be formed in a person's mind, the law doesn't fix any definite standard of time. It does not say any amount of days, or hours or weeks or months are necessary within which those two elements might be formed in the human mind. Deliberation and premeditation may be formed in the human mind in a second's time. The law says that if a defendant, before he takes human life has time to think, and does think, and does, as a result of his thinking, fire the fatal shot, that would constitute a sufficient time for these two elements to have been formed in his mind.

The last element of murder in the first degree is malice. What is malice? The law says that malice is the wilful doing [fol. 23] of a wrongful act, without any legal cause or justification therefor. If a defendant does a wrongful act, if he

does it wilfully; if there is no legal cause or justification for him doing that act, then the law says that that is a malicious act. But malice, gentlemen of the jury, is something that can't be seen. It is invisible; it is in the mind of man; and how, then, is a jury to get at whether or not the act of a defendant, if he did anything at all, is a malicious act. Well, the law says this; that if one person intentionally uses a deadly weapon and the death of another person follows therefrom, then the jury trying that person may infer the existence of malice from the intentional use of the deadly weapon, unless all of the facts and circumstances of the case rebut that presumption of the law. That is not a conclusive presumption of the law. One person may intentionally use a deadly weapon and another person may die therefrom, but that is not conclusive of malice. Self defense may rebut that, for that is one defense which rebuts that presumption of the law. That presumption of the law is not conclusive. A jury is not allowed to say that from the intentional use of a deadly weapon, where death results, that that is conclusive of malice, but the jury may infer it, unless all the facts and circumstances of the case rebut that presumption of the law.

Those, gentlemen of the jury, are the four elements of murder in the first degree.

This defendant, in order to be guilty of murder in the first degree, must have committed this homicide of Caroline Avery, unlawfully and wilfully, and with deliberation and with premeditation and with malice, in Bibb County, Alabama, and before this indictment was returned into Court. It doesn't make any difference, gentlemen of the jury, in a murder case, when the Grand Jury acts, provided it acts after the offense has been committed. There is not statute of limitations on murder. It is never out of date. If a murder was committed in Bibb County, Alabama, fifty years ago, or seventy five years ago, then the Grand Jury that meets here this Fall can act upon it. There is no limitation on it; it never dies as the result of the passage of time. It is of no concern, in this case as to when this indictment was returned into Court, except that it must have been returned into Court after the commission of the homicide. That is murder in the first degree. The burden of proof is on the State of Alabama in this case, as in every criminal case. The State is required to satisfy you from the evidence here, beyond a reasonable doubt and to a moral certainty

that this defendant, Lonnie Avery, in this County, Bibb, and before this indictment was returned into Court, wilfully and unlawfully, and with deliberation and premeditation and with malice killed Caroline Avery.

[fol. 24] Murder in the second degree, gentlemen of the jury, is the unlawful taking of human life, wilfully and with malice, but without any deliberation and without any premeditation—an unlawful taking of human life, wilfully and with malice. Those are the two offenses embraced in this indictment.

The defendant has plead not guilty and not guilty by reason of insanity, but with respect to that second plea of not guilty by reason of insanity, the Court will not charge you, the law in regard to that, in the absence of any evidence in regard to insanity. When the defendant put in his plea of not guilty, that is all the law requires him to do. He does not have to take the stand unless he voluntarily desires to do so—he may take the stand if he sees fit and testify like any other witness. When he says that he is not guilty, he denies that he is guilty of murder in the first degree; he denies, also, that he is guilty of murder in the second degree, and when he puts in that plea, there is no burden on him. He does not have to put up a single witness. He can sit and not say a word, if he so elects and desires. And the reason for that is the law presumes that he is innocent. That puts the burden of proof entirely on the State of Alabama. The law says to this man that he is presumed to be innocent and that presumption of innocense is to be regarded by you as evidence in his behalf, just as the testimony of any witness, and it stays with the defendant, until all the evidence satisfies you beyond a reasonable doubt and to a moral certainty that he is guilty, if it does so satisfy you, and then in that event, that presumption of innocence would no longer be of any benefit to this defendant, for the reason that it would have been overcome by the entire evidence. The Grand Jury indicted this man, but that is not evidence. The petit jury should never regard the indictment as any evidence—what the Grand Jury did has no bearing on his guilt or innocence, for it is not evidence. The indictment has brought him into Court today, and he has put in his plea, and when that is done, then the indictment has served its purpose.

Now this defendant says that he is not guilty, and that Caroline Avery met her death as the result of an accident;

that he is, therefore, not guilty of murder in the first degree and that he is not guilty of murder in the second degree, but that it was an accident.

Now, what is an accident. The law recognizes that people die accidentally, and if they di die accidentally, then the law doesn't hold any one responsible for the death of the party so dying. What is an accident? An accident, gentlemen of the jury, is when one person—you can say this defendant, since he has put in that plea, is engaged in the [fol. 25] doing of a lawful act, and while doing that act, he exercises due care, and there is no intent on his part to do any wrong, to do any harm, to do any injury, then if death follows from the doing of that act, then the law says he is not responsible; that it is a misfortune that happened. The law puts the burden on him, with respect to that, however. He must reasonably satisfy you, from all the evidence in the case that he was engaged in doing a lawful act, at the time, and that in doing that lawful act, he exercised due care; that is such care as an ordinarily prudent person would have exercised under the same circumstances or under similar circumstances and like conditions and that there was no intent on his part to do any injury to Caroline Avery.

You must determine from all this evidence whether the defendant was engaged in doing a lawful act at the time he says this woman Caroline Avery was attempting to draw a pistol from underneath her sweater, and that a scuffle followed or ensued and that he was trying to get the pistol, to keep from being shot by her.

The law permits any person to prevent the other person from doing him any harm. He had a right, if that be true, to try to get the pistol from her. Now, then, did he, then and there, exercise due care, such care as an ordinarily prudent person would exercise under similar circumstances and under like conditions, and was there any intent on his part to do Caroline Avery any injury. If you are reasonably satisfied from all this evidence that he was doing a lawful act, that he did exercise due care, and that there was no intent on his part to do her any injury, then that would constitute an accident. The law does not hold any person responsible to the law for any accident. It is for you gentlemen to determine whether an accident did take place.

The State of Alabama says that that was not true, that there was no accident, that it was an unlawful homicide committed by this Defendant under such circumstances as to constitute murder in the first degree or murder in the second degree, and that no accident took place, at all.

There is some evidence here tending to show that the defendant has been convicted of the offense of assault with intent to murder. That is before you wholly for the purpose of affecting the credibility of this defendant. We are not trying him here today for assault with intent to murder. He says that he was convicted of that offense. That is a felony which carries with it moral turpitude, and the law says that anyone that has been convicted of any offense, such as assault with intent to murder, involving moral turpitude, that that fact is allowed to go before the jury [fol. 26] to affect the credibility of his testimony. We are not trying him on that charge today, but the law allows that to go before you in order to affect the credibility of his testimony.

There is also certain testimony here tending to show that after this crime was committed, if it was committed, this defendant left Bibb County and several years afterwards was arrested in Pittsburgh, Pennsylvania. Flight, gentlemen of the jury, is what that testimony was introduced for. A defendant may flee from a sense of guilt or a defendant may leave the scene of the alleged homicide, the County of the alleged homicide, for some bona fide purpose. The fact, if it be a fact, that this defendant was arrested in Pittsburgh, Pennsylvania, and that he left Bibb County, and went there, doesn't necessarily go to show guilt on his part, but the jury may look at that fact, if it be a fact, as being a circumstance tending to show a sense of guilt on the part of the defendant. A defendant may leave bona fide, for business purpose, not connected at all with any criminal offense, but it is for you gentlemen to determine from all this evidence, as to why he left Bibb County after the alleged commission of this homicide.

Now, that is this case, gentlemen of the jury. It is an important case, both to the State and to this defendant, and a heavy duty rests on the shoulders of you jurors. I don't know of any duty, placed by law, on a citizen of this State, that is greater and more serious than that placed on the shoulders of a petit jury trying a defendant, charged with murder. It is serious, and it is sol-mn business. It is seri-

ous to the citizens of this State and it is likewise serious to this defendant. The State of Alabama and the defendant at bar are both deeply interested in the result of this case. Now you don't know the State of Alabama, and you don't know this defendant. You have been selected from this venire of jurors as being a fair and impartial jury, without any bias and without fear, favor, and will, from the evidence return a true verdict, whether it be for the State of Alabama, or whether it be for the defendant at the bar, doesn't worry you, or concern you one moment. You are here to administer the law as you find the law and the facts from the case.

Now the law says that if you are satisfied from all this evidence, beyond a reasonable doubt, and to a moral certainty, and if you have an abiding conviction in your minds that this defendant is guilty, then it is your duty to bring in a verdict accordingly. If you have a reasonable doubt as to this defendant's guilt, after you have considered all the evidence, or if you have a reasonable doubt arising from a want of satisfying evidence in the case, then the law says that you should give the defendant the benefit of that doubt and bring in a verdict of not guilty.

[fol. 27] If you are reasonably satisfied from this evidence that this woman, Caroline Avery, met her death accidentally at the hands of this defendant, then you should bring in a verdict of not guilty.

The punishment, gentlemen of the jury, for murder in the first degree is either death or imprisonment for life in the penitentiary, at the discretion of the jury. You have a discretion, either death or life imprisonment.

For murder in the second degree, the punishment is ten years in the penitentiary and any number above that that the jury sees fit to impose—the maximum is at your discretion.

For your convenience I have written out four verdicts and I don't want you to get the impression at all that I am suggesting in any wise what verdict you return, because I am not. I am only giving you a form for the four verdicts which you may return in this case. For murder in the first degree, there are two, one is death and the other is life imprisonment; for murder in the second degree, a form, and for not guilty, a form. Now don't get the idea at all that I am trying to intimate what verdict

you should return, because the Court has absolutely nothing to do with that.

Here are the four verdicts, which I shall read to you. If you find the defendant guilty of murder in the first degree, the form of your verdict will be: "We the jury find the defendant guilty of murder in the first degree, as charged in the indictment and fix his punishment at either death or life imprisonment."

If you find the defendant guilty of murder in the second degree, the form of your verdict will be: "We the jury find the defendant guilty of murder in the second degree as charged in the indictment, and fix his punishment at imprisonment in the penitentiary of this State for blank number of years.", ten years as a minimum and any number above that, that you see fit and proper.

In the event you should find the defendant not guilty, the form of your verdict should be: "We the jury find the defendant not guilty."

Those are the forms of the verdict. The defendant, gentlemen of the jury, -as asked the Court to give you a number of written charges. These charges are correct statements of the law, they are not in conflict with the oral charge of the Court and are to be taken by you gentlemen in connection therewith.

Upon the completion of the oral charge, the defendant's counsel objected to the Court furnishing forms for the ver-[fol. 28] dict of the jury, without including among them, a form for conviction for manslaughter.

The Court, thereupon, granted the defendant an exception to this portion of the oral charge.

Defendant's Requested Charges, Given

The Court then, gave at the request of the defendant, the following charges in writing:

No. 1. It is certainly the duty of the jury, in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. This does not mean that all, or any part of it, shall be believed. The law exacts no such rule as that. It must be considered, and given such weight as the manner of giving it in, its intrinsic nature, and the other testimony in the cause entitle it to. This much, and

nothing more, this the jury must and will do, as the only way of performing their highest, sworn duty of rendering a true verdict, according to the evidence, and the Court charges the jury that if, upon a consideration of all the evidence they have a reasonable doubt of the defendant's guilt, arising out of any part of the testimony they must find the defendant not guilty.

Given.

Jno. Miller, Judge.

No. 3. The Court charges the jury that, before they can convict the defendant they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly consistent with every other rational conclusion; and, unless they are so convinced of his guilt, by the evidence beyond all reasonable doubt, they must acquit the defendant.

Given.

Jno. Miller, Judge.

No. 4. I charge you gentlemen of the jury, if there is a probability of the defendant's innocence arising out of the evidence in the case, you cannot convict the defendant.

Given.

Jno. Miller, Judge.

No. 5. The Court charges the jury that if you are reasonably doubtful as to the proof in this case of any material allegation in the indictment, then you must find the defendant not guilty.

Given.

Jno. Miller, Judge.

No. 6. I charge you gentlemen of the jury, that to justify your conviction of the defendant with any offense within the charge made within this indictment it is the duty of the State and on it rest- the burden thereof to satisfy you by competent evidence that the defendant is guilty beyond a reasonable doubt.

Given.

Jno. Miller, Judge.

[fol. 29] No. 7. The Court charges the jury that the only foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence beyond a reason-

able doubt and to a moral certainty that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof and to so impress the minds of the jury of his guilt, they should find the defendant not guilty.

Given.

Jno. Miller, Judge.

No. 8. The Court charges the jury that a person charged with a felony should not be convicted, unless the evidence excludes, to a moral certainty, every reasonable hypothesis, but that of the defendant's guilt; no matter how strong the circumstances are, they do not come up to the full measure of proof which the law requires, if they can be reasonably reconciled with the theory that the defendant is innocent.

Given.

Jno. Miller, Judge.

No. 9. If after weighing and considering all the evidence in this case, one or more of the jurors feels that he desires more evidence before he or they can ever get an abiding conviction of the guilt of the defendant, then the juror has a reasonable doubt of the defendant's guilt, and the jury could not convict the defendant.

Given.

Jno. Miller, Judge.

DEFENDANT'S REQUESTED CHARGE, REFUSED

Counsel for the defendant, in the presence of the jury, and before the jury retired to consider the case requested the Court to give to the jury No. 2 in writing, as follows:

No. 2. The Court charges the jury that each and every one of you is entitled to have his own conception of what constitutes a reasonable doubt of the guilt of this defendant, that, before you can convict this defendant, the evidence must be so strong that it convinces each juror of the defendant's guilt beyond all reasonable doubt; and if, after a consideration of all of the evidence, a single juror has a

reasonable doubt of defendant's guilt, then you cannot find the defendant guilty.

Refused.

Jno. Miller, Judge.

And the defendant excepted to the action of the Court in refusing such charge.

VERDICT

The jury returned a verdict against the defendant as follows:

"We, the jury, find the defendant guilty of murder in [fol. 30] the 1st degree as charged in the indictment and fix his punishment at death."

J. E. Smitherman, Foreman."

Thereupon the defendant did on the 24th day of March, 1938, file a motion in the Circuit Court of Bibb County, Alabama, in the said cause of The State of Alabama against Lonnie Avery, to set aside the verdict and judgment in the said case, and to grant the defendant, Lonnie Avery, a new trial, which said motion the Court overruled and to which action of the Court, in overruling the defendant's said motion, the defendant excepted. The said motion, the several orders of the Court continuing the same, the order of the Court overruling the said motion and the evidence taken at the time of hearing said motion is as follows:

Motion for new trial omitted. Printed side page 11, ante.

[fol. 31] Amendment to motion for new trial omitted. Printed side page 13, ante.

[fol. 32] ORDER OVERRULING MOTION FOR NEW TRIAL

On this June 30, 1938, this motion with amendment submitted and argued and upon consideration of it and the evidence it is denied and overruled, and defendant excepts to the ruling of the Court.

Jno. Miller, Judge.

In connection with the above set out motion the Court examined Mr. John Foshee, one of the attorneys for the defendant, and upon said examination the said Mr. John Foshee did testify as follows:

"This defendant was arraigned on Monday, March 21st, and Mr. Fred Wood and I were appointed to defend him. The case was set for trial on Wednesday the 23rd of March. Neither Mr. Woods nor I had the clerk subpœna any witnesses for the defendant. The scene or location of the homicide was in the Harrisburg community, somewhere between nine and twelve miles. We turned off this side of Vernon Lewis's place; it is twelve or fifteen miles from Centreville. Neither Mr. Wood nor I went to the point of the homicide before Wednesday. We had cases set in Court all the week and one other reason was it was bad weather. It was raining and this place was off the regular well beaten road. It was in the woods and in rainy bad weather like it was at that time I doubt if you could get in there. I conferred with the defendant on Monday or Tuesday, with reference to any witnesses that might be su-pœnaed. The defendant gave me no witnesses' names. I would like to explain something in regard to that. The man is a negro and is illiterate and in my opinion he doesn't have the mind of an eight year old or even a six year old child. He couldn't give me any information that would help me. I made inquiries of people who live in the Harrisburg Community. I saw his brother on the morning of the day he went to trial and some more folks that day. His brother said he did not know anything about the case. I also interposed the plea of not guilty by reason of insanity, at the arraignment. There were three, no four, local doctors in Centreville at that time. I did not confer with any one of the four with reference to that special plea. These doctors here are country doctors and are not experts on mental [fols. 33-35] diseases. That negro is, at least, feeble minded, very much so. He is uneducated; he can't read and write and I know he is feebleminded. I wouldn't say how these doctors here could testify. I have been here three and a half years and I wouldn't say how they would testify to anyone's sanity. I did not have any subpœnaes issued for any lay witnesses with respect to that special plea; I did not have an opportunity to get out and hunt up any witnesses.

On Monday I had one or two criminal cases in Court. I was representing Huey Frederick. Neither of the two cases was tried that day. On Tuesday I was still waiting for the cases to come up. We tried one of the cases Tuesday, I know. There is a copy of the affidavit in the file. I have read Mr. Wood's affidavit, but if I read it again it might refresh my recollection some. I have forgotten about it now. I was trying to think who Fred represented here. If I had the affidavit I could give you the names of the cases. One of them was the Worrell case. I do not know when it was disposed of. I did not have an opportunity to get out and find any witnesses on either plea."

At this point the defendant re-introduced and re-filed the motion for a continuance and the affidavits of Hon. Fred G. Wood and Hon. John Foshee, in support thereof, which said motion and affidavits were first filed on the day of the trial, March 24, 1938, in support of the motion for a continuance.

Motion for continuance, omitted. Printed side page 5, ante.

[fol. 36] Mr. Fred G. Wood, one of the attorneys for the defendant, did testify on direct examination by Mr. L. S. Moore, as follows:

"I was appointed by the Court to defend Lonnie Avery on the charge of Murder; Mr. Foshee and myself were appointed. We received our appointment at the same time; that is the same time the defendant was arraigned, which was the 21 day of March, 1938, being Monday. I think I entered a plea for the defendant at his arraignment. I would answer that he was arraigned after my appointment. I also entered a plea of not guilty by reason of insanity, along with the plea of not guilty; two different pleas. The case was set for hearing on March 23, 1938, being Wednesday of the week of our appointment. Monday of that [fol. 37] week was the beginning of our criminal week of court. Cases were set for trial continuously from Monday morning on through Wednesday. I had another case in Court in which I had been regularly employed as counsel for the defendant. Some of those cases were set for trial on Monday of that week. To the best of my knowledge I think some of the cases were set for trial on Tuesday of that week. Some of my cases were not disposed of on Mon-

day and were carried over into Tuesday and Wednesday. These required my presence in the Court room. Court convened, to the best of my recollection, about nine o'clock on Tuesday morning. It convened about the same time on Wednesday. Some of the cases were carried over for trial on Thursday of that week; several cases were. This case was not tried on Wednesday. It was carried over from Wednesday to Thursday, when it was tried. My presence in Court was required by the attendance upon cases in which I had been duly and regularly employed as counsel for the other defendants; that is on Monday, Tuesday and Wednesday and Thursday of that week. I made a motion, as attorney for Lonnie Avery, to continue the case, the grounds for the motion are set out in it. That motion was submitted to the Court on the 24 of March, which was the date the case was called for trial. I introduced in evidence, at that time, in support of that motion, an affidavit, which is a part of the file in this cause. Mr. Foshee also submitted the motion; he was appointed, along with myself to defend Lonnie Avery. Copies of our motion are in the file in this cause, as well as copies of our affidavits. I was present at the arraignment of Lonnie Avery. I don't remember if the Judge of the Court making the appointment asked Lonnie Avery if he was able to employ counsel. I don't remember whether he asked him if he had friends or relatives who would be interested in assisting him in employing counsel to represent him. The defendant was a negro. I talked with the defendant, shortly after his arraignment, over in the county jail, after Court recessed that day. In my opinion he is very illiterate and ignorant. In my opinion, as a layman, I would say his mind is very weak. We went over and talked with him and he was unable to give us any information at that time, because he said he had been absent for about six years, and was unable to give us the names of any people who lived in that territory at the scene of the crime, and we were unable to get any information which might throw any light on the case at all. We were unable to get any information out of him that would aid us in his defense. As well as I remember, we got in touch with two of his brothers about thirty minutes before the trial, on Thursday; prior to that time we had made some effort to contact them. The first time we were [fol. 38] able to contact them was about thirty minutes before the trial. This defendant had been away from Ala-

bama for sometime, living in another State, according to my information. He had been back here a few weeks before his trial. I believe he was brought back the week before the criminal week; that is the best of my knowledge. I had not seen the defendant prior to his arraignment. I did not know anything about defending him until you were appointed to serve by the Court. I was unable to interview any witnesses that might have testified, other than those subpœnaed by the State. I was in Court up to the time of the trial and was unable to interview and discuss the case with witnesses who might have testified to the good character of the defendant; I was at no time, due to my position in Court, able to interview witnesses as to the bad character of the deceased, or as to the fighting, violent nature or character of the deceased; I was also unable to interview any witnesses as to the truth and veracity of the witnesses for the State. There were only three witnesses for the State and it is my information that two of them came from West Virginia. I had no opportunity to write to or investigate in any way the character for truth and veracity of the witnesses who lived in West Virginia. I was prevented by reason of my attendance upon this Court, from viewing the scene of the crime, which was located at a remote place in Bibb County, Alabama, and several miles from Centerville, where the trial was held. I was prevented, because of being employed in other cases, from interviewing the doctors here in Centerville as to this man's sanity. The physic-ans here in Centerville did not maintain their offices at night. I believe there were four practicing physic-ans in Centerville at that time.

At this point Mr. Moore, who is questioning the witnesses, asked the following question:

Q. Now are those physic-ans experts on mental diseases?

Whereupon the Court stated: "I'll sustain an objection to that."

I do not know whether the physicians here in Centerville are experts on mental diseases or not. I did not get any doctors to go and see the negro and examine him.

The Court thereupon asked the witnesses certain questions, to which he replied, in substance, as follows:

"I have been practicing law for three years; I live here in Centerville. I can't say how long Mr. Foshee has been

practicing law; he has been living here in Centerville for about three and a half years. To the best of my knowledge this defendant was arraigned directly after dinner on Monday. Mr. Foshee and I were appointed, I believe before the arraignment. We were appointed before the arraignment, because we interposed pleas for the defendant at the ar- [fol. 39] raignment. After Court was dismissed on Monday afternoon, we talked to the defendant; however, shortly before the arraignment, we talked to him, directly after being appointed. At the time we talked to the defendant he told us he had been away from here six years and did not remember who was living here then, at the time of the crime. We got no witnesses at the time of that first conference. To the best of my knowledge I had two cases on the docket for Monday, March 21. Neither one of these cases was tried on that day. I don't remember how many cases I had on the docket for Tuesday, besides the ones that were carried over. To the best of my knowledge the same two cases were carried over from Monday to Tuesday, and again to Wednesday and then Thursday and then settled on Thursday. I can't say where I went on Monday night after Court adjourned. I don't think I went to the picture show. I have an automobile. I sell automobiles at Blocton. I have a Plymouth automobile, which is in good running order and was at that time, on March 21, March 22, and March 23. Mr. Foshee has an automobile. I couldn't say whether it was in good running order on those dates. I don't remember that I consulted with any witnesses on Monday night in the cases in which I had been employed, as attorney. I don't remember doing that on either Tuesday or Wednesday night. As well as I remember, one or two of those nights Court was in session until nine or ten o'clock; I think it was during the trial of the case of the State against Jack Ware and it was tried until nine o'clock. My presence was not required in Court while that case was going on that night. This crime occurred about ten miles from Centerville, towards Selma, out in the Harrisburg community; you would go out highway number five to get there. That road is paved for about two miles out from Centerville; the rest of the highway is good gravel road towards Selma, but the scene of the crime is some distance off the highway. I couldn't say how far from the highway the crime occurred. I didn't go out to the scene of the crime on either Monday night, Tuesday night or Wednesday night; I can't say whether Mr. Foshee did or

not. I had never been to Harrisburg to investigate this crime up to the time of the trial. Dr. S. C. Meigs, Dr. T. E. Schoolar, Dr. Williams and Dr. Cooper Nicholson were the practicing physic-ans in Centerville; I know all these doctors personally; they are active physic-ans. I have never had to send for one of them. I would think, in a general way, they they would answer a call at night if I should call them. I was in Court all during their office hours and I never had a chance to go to their office during the day to see them and have a conference with them with respect to this man's sanity. The only time I have ever heard one of the local [fol. 40] physic-ans testify as to the mental condition of anybody was when one testified as to the mental condition of a negro up there in Court, and he had a letter from Dr. Partlow, that he read up there. I didn't have any one of those four physic-ans subpoenaed. I did not request any one of these four physic-ans to go to the jail and examine this defendant. I think all four of these physic-ans were here during that term of Court. Occasionally I buy Coca-colas at the Meigs Drug Store, and occasionally see Dr. Meigs there. I couldn't say that the same is true of Dr. Williams across the street; he does run a drug store across the street and I think he is there from day to day. The Meigs Drug Store is about a block and a half from the County jail. On the trial of this case there were no witnesses subpoenaed for the defendant. We hadn't had time to interview any witnesses, so neither Mr. Foshee nor I subpoenaed or requested the Clerk to subpoena any witnesses for the defendant on either the plea of not guilty or not guilty by reason of insanity. To the best of my knowledge Harrisburg is about ten miles from Centerville. I run a business at Blocton, which is an automobile sales agency fro Plymouth, cars, Dodge and Plymouth. I did not make any trips to Blocton on either Monday night, Tuesday night or Wednesday night for either pleasure or business. I don't remember leaving Centerville on any of those nights for a picture show in Marion, Calera or Selma. I can't say whether I was home on those nights. One one of those nights Mr. Foshee and I prepared some charges; I don't remember which night it was. There was a conference between Mr. Foshee and I with reference to witnesses, the law of the case and the strategy of the trial. We talked about the law in the case at the time we prepared the charges and we discussed the possibility of getting away from Court to

try to dig into the case and investigate it to see if we could not find out come witnesses as to the good character of the defendant, and as to the facts in the case. I did not request the Court for leave of absence in order to give me an opportunity of looking into the merits of the case.

Mr. L. S. Moore, a material witness in behalf of the defendant, testified as follows, after being first duly sworn:

"I want to say that after the defendant's conviction and sentence, I received a letter from his sister, who lives in West Virginia, and then, through correspondence with her I was employed in this case. I was not employed in the case prior to his conviction."

To which action, order and judgement of the court in overruling defendant's said motion to set aside the verdict and judgment against the defendant and to grant the defendant a new trial, the defendant did then and there duly except. [fol. 41] Whereupon the defendant, Lonnie Avery, does hereby tend and submit the above and foregoing and prays that same may be taken and considered as the defendant's legal Bill of Exceptions in said cause upon the same being considered and signed according to law by his Honor, John Miller, Judge of the 4th Judicial Circuit of Alabama, who presided as Judge of the Circuit Court of Bibb County, Alabama, upon the trial of said cause. This being within ninety days from the date when the Court overruled the defendant's said motion, for a new trial.

Presented to me on this Sept. 21, 1938.

Jno. Miller, Judge.

Order Settling Bill of Exceptions

The foregoing Bill of Exceptions was presented to me, John Miller, Judge of the 4th Judicial Circuit of Alabama, and the Judge of the Circuit Court of Bibb County, Alabama, who presided at said trial of The State of Alabama against Lonnie Avery in said cause, on this the 21 day of Sept. 1938, within ninety days from the date when the Court overruled the defendant's said motion for a new trial, and the above and foregoing is hereby proven and signed by me

and made the legal Bill of Exceptions in the above stated cause on this the 12th day of November, 1938, within the time allowed by law for signing same, as witness my hand.

Jno. Miller, Judge 4th Judicial Circuit of Alabama and presiding Judge upon the trial of said cause.

[File endorsement omitted.]

[fols. 42-47] Court's oral charge to jury omitted. Printed side page 21, ante.

[fol. 48] Upon the completion of the oral charge, the defendant's counsel objected to the Court furnishing forms for the verdict to the jury, without including among them, a form for convicted for manslaughter.

The Court, thereupon, granted the defendant an exception to this portion of the oral charge.

[fol. 49] The Court refused to give to the Jury the following written charges, requested by the defendant, to-wit:

Defendant's requested charge refused, omitted. Printed side page 29, ante.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51] IN SUPREME COURT OF ALABAMA

Present: All the Justices.

2 Div. 144

LONNIE AVERY

vs.

THE STATE OF ALABAMA

Bibb Circuit Court

ORDER OF SUBMISSION—March 23, 1939

Come the parties by attorneys, and submit this cause on briefs for decision.

[fol. 52] IN SUPREME COURT OF ALABAMA

October Term, 1938-39

2 Div. 144

LONNIE AVERY

v.

STATE OF ALABAMA

Appeal from Bibb Circuit Court

OPINION

GARDINER, Justice.

The appeal is from a judgment of conviction of murder in the first degree, with infliction of the death penalty.

Before arraignment, defendant having no counsel, the trial court appointed two members of the local bar to defend him, and the record discloses these attorneys conscientiously exerted all reasonable efforts in his behalf. Their appointment was on Monday, March 21st, and the case was set for trial two days thereafter, but was not reached for trial until March 24th, at which time counsel made motion in writing for a continuance of the cause for lack of time for preparation.

Our examination of this record fails to disclose any order of the court on this motion. If a ruling was had thereon it does not here appear. The case proceeded to trial on the 24th, and a motion for a new trial, based upon the same grounds set forth in the motion for continuance, was denied. In view of the absence of any ruling on the motion for continuance, it may be seriously questioned that [fol. 53] this matter is properly here presented for review. But whether so or not, and conceding for the moment its proper presentation, no reversible error would be made to appear.

Here the appointment of counsel was no mere "empty formality," as insisted in brief, with citation of Powell v. State, 287 U. S. 45, 84 A. L. R. 527. This case presents no analogy to the Powell case, supra, nor to the other authorities called to our attention, viz.: Blackman v. State, 76 Ga. 288; State v. Collins, 104 La. 629, 81 Am. St. Rep. 150; North v. People, 139 Ill. 81, 28 N. E. 966; State v.

Simpson, 38 La. Ann. 23; Noel v. State, 17 Okla. Crim. Rep. 308, 188 Pac. 688; Jones v. State, 84 Tex. Crim. Rep. 4, 204 S. W. 437, as well as others cited in the note to Powell v. State, supra. The appointment here was far from a mere formality, and, indeed, this record shows that the two attorneys designated by the court to represent defendant, did their full duty intelligently and well.

The trial court's examination of counsel on the hearing of the motion for a new trial, demonstrates without further elaboration, there was presented no necessity for a continuance of the case, and we think the record discloses that the difficulty under which counsel labored related to the lack of material on which to base a defense, rather than any mere matter of time.

There were three eye-witnesses to the killing who testified for the State. Deceased was defendant's wife, though the couple had been living apart for two months, and unarmed was on her way from the house to get a wash-tub when the defendant shot her with a pistol as she ran. "When she broke to run, he fired at her twice. She turned round and made two or three steps toward him and fell on her face. He approached her then and stood above her and shot twice across her. She was still lying on her face. Then he walked back of her and fired a shot back here in the back of her head."

This was in February 1932. Defendant ran and was apprehended a short time before the trial (March 24, 1938) in Pennsylvania, denied that his name was Lonnie Avery, or that he came from Bibb County, or knew anyone there. Defendant did not deny the death of his wife from pistol shot wounds, but his defense was rested upon the theory [fol. 54] that deceased had the pistol which she drew from her sweater as they argued, and as she drew out the pistol, he attempted to take it from her and the pistol fired accidentally.

Counsel first interposed a plea of not guilty, and another of not guilty by reason of insanity. But upon the trial withdrew the latter plea. It is quite evident counsel became convinced this latter plea could not be sustained, and there is nothing in the record to indicate any improvement in this situation had the case been continued.

No witnesses for defendant were suggested, and we think it very clearly appears that those who testified were the only persons who were present.

The matter of continuance was in the sound discretion of the court, and it is clear enough no abuse of that discretion here appears—6 Ala. Digest (Key 586, et seq.); 16 Corpus Juris 482.

The trial court fully charged the jury both upon murder in the first and second degree, and furnished forms of verdict relating thereto, as well as a form for a verdict of not guilty. He likewise charged the jury as to an accident, and that if the killing was an accident the defendant might be acquitted. For the trial court's failure to furnish a form of verdict for manslaughter, defendant reserved an exception. But the mere failure of the court in that regard would not be here reviewable under McPherson v. State, 198 Ala. 6. See, also, Peterson v. State, 227 Ala. 361, 150 So. 156.

This aside, however, there was nothing in the record calling for a consideration of manslaughter in the first degree, to which exception related. Whitehead v. State, 206 Ala. 288.

We have treated the matter mentioned and discussed in brief. But mindful of our duty in cases of this character, we have examined the record for any reversible error that might appear, and upon due consideration, we find no error to reverse. Accordingly the judgment must stand affirmed.

Affirmed.

Anderson, C.J., Thomas, Bouldin, Brown, Foster, and Knight, JJ., concur.

[fol. 55] IN SUPREME COURT OF ALABAMA

Present: All the Justices.

2 Div. 144

LONNIE AVERY

vs.

THE STATE OF ALABAMA

Bibb Circuit Court

JUDGMENT—April 27, 1939

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs

and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It is therefore considered that the judgment of the Circuit Court be in all things affirmed.

The time fixed by the judgment and sentence of the Circuit Court for the execution of the prisoner Lonnie Avery, having expired pending this appeal, it is now ordered that Friday, June 9th, 1939, be fixed as the date for the execution of the Defendant Lonnie Avery. It is therefore ordered that the Sheriff of Bibb County deliver the Defendant Lonnie Avery to the Warden of Kilby Prison at Montgomery, Alabama, and that the said Warden of Kilby Prison at Montgomery, Alabama, execute the judgment and sentence of the law on Friday, June 9th, 1939, before the hour of sunrise on said day in said prison, by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Lonnie Avery until he is dead, and in so doing he will follow the rules prescribed by the Statutes.

It is also considered that the appellant pay the costs of appeal of this Court and of the Circuit Court.

[fol. 56] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY

To the Honorable John C. Anderson, Chief Justice of the Supreme Court of Alabama:

Your Petitioner, Lonnie Avery, by his attorneys John Foshee and L. S. Moore, respectfully exhibits this his petition and humbly complaining would show unto Your Honor facts as follows:

Your petitioner, Lonnie Avery, was convicted for the offense of murder in the first degree at the spring term of the Circuit Court of Bibb County, Alabama, 1938, and his punishment was set at death, and from that verdict and judgment the said Lonnie Avery instituted an appeal to the Supreme Court of Alabama. Said appeal was heard by the Supreme Court of Alabama and the judgment and convic-

tion in said cause was affirmed, and the said Lonnie Avery was ordered to be electrocuted on, to-wit: June 9th, 1939, as a punishment for said offense.

Your petitioner avers that in the trial of said cause in the Circuit Court of Bibb County, Alabama he was denied due process of law in contravention of the Constitution of the United States of America; that said question was presented by him in his said appeal to the Supreme Court of Alabama; that your petitioner has a legal right to present said cause to the Supreme Court of the United States of America by Writ of Certiorari; that your petitioner and his said attorneys have not to date had sufficient time in which to perfect the proceedings necessary to the commencement of his appeal to the said Supreme Court of the United States [fol. 57] of America or to cause said Writ of Certiorari to be issued; that your petitioner will petition the Supreme Court of the United States of America for a Writ of Certiorari directed to the Supreme Court of Alabama ordering a removal of said cause to the Supreme Court of the United States of America and for a consideration of said cause; that said proceedings will be ins-ituted within the time required by law.

Wherefore Your Petitioner prays that Your Honor will grant to him an order or decree staying or suspending said sentence, judgment, conviction and punishment pending the action of the Supreme Court of the United States of America in said cause.

John Foshee, Attorney for Petitioner. L. S. Moore, Attorney for Petitioner.

[fol. 58] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER GRANTING STAY—May 24, 1939

Whereas, the Judgment of the Circuit Court of Bibb County, Alabama, in the case of Lonnie Avery vs. The State of Alabama was affirmed by this Court on April 27th, 1939, and the said Lonnie Avery was ordered to be electrocuted on Friday, June 9th, 1939; and,

Whereas, the said Lonnie Avery, through his Attorneys, has petitioned this Court for a suspension and stay of said

execution in order to give sufficient time to petition the Supreme Court of the United States for a Writ of Certiorari to be directed to this Court for a hearing of said cause in the Supreme Court of the United States;

Now, Then, It Is Ordered on petition of the Defendant, Lonnie Avery, that the date of the execution of the death sentence heretofore entered for June 9th, 1939, is hereby reset for Friday, June 30th, 1939, and this latter date is fixed for the date of the execution of the sentence of this Court.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 60-61] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR FURTHER STAY

To the Honorable Supreme Court of Alabama:

Your petitioner, Lonnie Avery, by his attorneys, L. S. Moore and John Foshee, respectfully exhibits this his petition and humbly complaining would show unto this Honorable Court facts as follows:

Your Petitioner was heretofore convicted for the offense of murder in the first degree in the Circuit Court of Bibb County, Alabama, and his punishment was set and fixed at death; that action of the circuit court of Bibb County, Alabama, was affirmed in all things, upon appeal, by this Honorable Court. The decision of this Court was rendered on the 27th day of April, 1939, and this Court re-set or fixed the 9th day of June, 1939, as the date for the execution of said sentence and punishment. This Court has heretofore granted an order or decree staying the sentence and execution of your petitioner and re-setting or fixing the 30 day of June, 1939, as the date for the execution of said sentence and your petitioner.

Your petitioner further avers that he has heretofore filed in the Supreme Court of the United States of America a petition for a writ of certiorari to be directed to this Court

in said cause; that said petition is now pending in said Court; that said Court is now in vacation and will not meet again before October 2, 1939; that said petition for a writ of certiorari cannot be heard or passed upon in said Court before the 2 day of October, 1939, which date is subsequent to the 30 day of June, 1939.

Therefore, your petitioner, humbly prays that this Honorable Court will render and order, decision, judgment or decree staying or suspending said sentence, judgment, conviction and punishment of your petitioner until the 13 day of October, 1939, or until the Supreme Court of the United States of America acts upon said petition for a writ of certiorari in said cause.

L. S. Moore, Attorney for Petitioner. John Foshee, Attorney for Petitioner.

[fol. 62] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER GRANTING STAY—June 26, 1939

In this cause it is made to appear to the Court by petition that the Defendant [Appellant here], Lonnie Avery, has filed in the Supreme Court of the United States a petition for a Writ of Certiorari in this cause for a review of the decision and judgment of this Court, and that said petition is now pending in said Court and that said Court is now in vacation and will not meet again before October 2nd, 1939, and that said petition can not be heard or passed upon in said Court before the 2nd day of October 1939, which date is subsequent to the 30th day of June, 1939, the date heretofor set for the execution of the Defendant;

And petitioner now prays this Court that an order be entered passing the date of his sentence heretofore set to Friday, October 13th, 1939, so as to enable petitioner to present and have passed upon by the Supreme Court of the United States his petition for a Writ of Certiorari and a review of his cause by said United States Supreme Court. And this Court, acting upon said petition grants the same and at petitioner's request Friday, the 13th day of October, 1939, is the date set for the execution of the sentence of this

[fol. 63] Court, and until the final execution of the sentence of this Court jurisdiction is hereby retained over said cause.

The date of the execution of the sentence heretofore fixed by the Supreme Court on, to-wit: June 30th, 1939, being now reset by the Supreme Court of Alabama from June 30th, 1939, to October 13th, 1939, it is therefore ordered that the Sheriff of Bibb County, Alabama, deliver the defendant [appellant], Lonnie Avery to the Warden of Kilby Prison at Montgomery, Alabama, and that the said Warden of said Kilby Prison at Montgomery, Alabama, execute the judgment and sentence of the law on Friday, October 13th, 1939, before the hour of sunrise on said day in said prison by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Lonnie Avery until he is dead, and in so doing he will follow the rules prescribed by the Statutes.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

Endorsed on cover: In forma pauperis. Enter Edward H. Saunders. File No. 43,531. Alabama Supreme Court, Term No. 124, Lonnie Avery, Petitioner, vs. The State of Alabama. Petition for a writ of certiorari and exhibit thereto. Filed June 20, 1939. Term No. 124, O. T. 1939.